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U.S. Citizenship and Immigration Services

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[redacted]

APR 20 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in athletics. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Part 4 of the I-140 petition form includes the question "Has any immigrant visa petition ever been filed by or on behalf of this person [i.e. the beneficiary]?," and if the answer is "Yes," the form instructs the petitioner to provide an explanation. In this instance, the petitioner has answered "No." This statement is not true. The same petitioner had previously filed another petition on this beneficiary's behalf, seeking the same classification. The earlier petition, receipt number WAC 01 059 53588, was filed December 13, 2000 and denied on November 21, 2001. The petitioner appealed that decision, and the AAO dismissed the appeal on July 22, 2002, seven months before the filing of the present petition on February 24, 2003. The petition includes no explanation about this earlier petition, an omission that cannot be explained by assuming that counsel simply checked the wrong box when preparing the form.

The same attorney prepared both Forms I-140, and the same individual [redacted] signed both forms on the petitioner's behalf. Therefore, we cannot infer that counsel and Mr. [redacted] were both unaware of the earlier petition when Mr. [redacted] claimed, under penalty of perjury, that no immigrant visa petition had ever been filed on the beneficiary's behalf. Indeed, substantial sections of counsel's new introductory brief are copied directly from the introductory brief that had accompanied the earlier petition. The evidence submitted in support of the new petition is also largely identical to that submitted with the first petition.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
>
> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the pertinent regulations at 8 C.F.R. §

204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

The petitioner is a martial arts instruction center that seeks to employ the beneficiary as a Kendo instructor. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Counsel states that the beneficiary's certification as a 7th satisfies this criterion:

> There are 2,760,732 people obtaining a Dan (black belt) in the world. There are only 1,694 who have achieved the level of 7th Dan and only 105 in the United States. This clearly indicates that the beneficiary reached the very top in this field, i.e. 0.00061% of the whole population practicing the Kendo at the master, black-belt, level.

Counsel does not cite any documentary source for the above numbers. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the small number of 7th Dan masters is a necessary, but not sufficient, factor to establish eligibility. Just because there are very few 7th Dan Kendo masters does not demonstrate or imply that everyone who holds that rank enjoys national or international acclaim.

Counsel acknowledges that there are nine, rather than seven, Dan levels, but counsel maintains "[t]he 8th and 9th levels are honorary, based upon one's age and exemplary achievement in the field of Kendo. 8th Dan requires one to be at the age of 48 years or older. . . . One has to be at least 65 years to be certified as a 9th Dan." The petitioner's documentation shows that the 7th Dan, too, has a minimum age requirement. Given the experience requirements for the various Dan levels, no one under the age of 34 can qualify to test for the 7th Dan. If level of rank, and scarcity of individuals holding that rank, are indications of extraordinary ability as counsel contends, then the 8th and 9th Dan grand masters outrank the beneficiary and they, not the beneficiary, are at the top of the field. As it stands, progression to higher Dan rankings is contingent on skill and experience, not on acclaim or success in athletic competition. Dan rankings provide, at best, an incomplete picture of a martial artist's standing in his field.

Most importantly, the petitioner has provided nothing to establish that a 7th Dan ranking is an "award" of any kind, let alone a major, internationally recognized award.

Barring the alien's receipt of a major, internationally recognized award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

> *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

Counsel repeats the assertion that the beneficiary's 7th Dan ranking qualifies as an award, but, as already noted, the record does not substantiate this claim. More persuasively, counsel cites the beneficiary's "receipt of countless medals for his winning participation in world class Kendo events." The beneficiary has won numerous Athletic Excellence Awards at National Kendo Championship Tournaments between 1981 and 1998. These awards satisfy this particular criterion, but the petitioner must meet at least two other criteria to show that the beneficiary qualifies for the highly restrictive classification sought. Because the beneficiary's last award was five

years before the filing date, the petitioner must also provide more recent evidence to show that the beneficiary continued to enjoy acclaim as of the 2003 filing date.

> *Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

Counsel cites four publications, all Japanese, under this criterion. An article by the beneficiary appeared in *Korea Kendo Exchange Commemoration Magazine*, which counsel describes as "a special publication by Kendo Club in Hongo High School in Japan, commemorating the battle experience with Korea Sungnam High School during March 20-27, 1990." The regulation calls for published materials *about* the alien, rather than *by* the alien. Furthermore, the petitioner has not shown that this publication, published by a high school, amounts to major media as the regulation requires.

The petitioner submits three articles, from *Kendo Japan*, *Sport*, and *Sakigake*, regarding high school kendo teams taught by the beneficiary. The *Kendo Japan* article is arguably about the beneficiary, including considerable information about his work with the team and comments from the beneficiary himself. The other articles contain considerably less mention of the beneficiary. The petitioner has not established that any of these periodicals is a major national or international publication.

The beneficiary's documented media attention appears to be limited to local coverage, in the context of visits by his team to compete with high school teams in Japan. The record does not establish any media coverage at all in Korea, the nation in which the beneficiary is said to have earned his greatest acclaim.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

Counsel states:

> [The beneficiary] is a member of the Korea Kendo Association. He is a 7th Dan instructor of Kendo. Membership as a Dan in any Kendo Association is a great achievement. Given the fact that in the world, only two hundred thirty six individuals have reached the degree of 7th Dan or higher, it is indeed an amazing achievement. [The beneficiary] has proven himself to be a martial artist of extraordinary ability through his long term membership since 1994 in the Korea Kendo Association and his achievement of 7th Dan.

Counsel's assertion that "[m]embership as a Dan in any Kendo Association is a great achievement" is not consistent with counsel's claim that "[t]here are 2,760,732 people obtaining a Dan (black belt) in the world." Counsel's claim that "in the world, only two hundred thirty six individuals have reached the degree of 7th Dan or higher" directly contradicts counsel's own assertion, in the same letter, that 1,694 individuals hold that rank. The paragraph containing counsel's erroneous reference to "two hundred thirty six individuals" derives, word for word, from the introductory brief that had accompanied the petitioner's first petition in 2000.[1]

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[1] There are non-substantive differences between the two paragraphs, specifically variations in the spelling of the beneficiary's name, and the original brief contains the numeral "236" rather than the words "two hundred thirty six." These differences may be due to revisions at the time of the 2003 filing, or the paragraph may have simply been "cut and pasted" from an unused draft version of the 2000 letter.

Counsel does not persuasively argue that the very act of attaining the 7th Dan constitutes a leading or critical role, nor is it clear what distinguished organization or establishment is served by that achievement.

Counsel also cites an October 6, 2000, letter from president of the Korea Kumdo Association. The AAO previously addressed this same letter in its previous appellate decision. Counsel contends that this letter demonstrates the beneficiary's "achievements as a Kendo team director and as a Kendo coach." mentions the beneficiary's "excellent performance in various championships and years of experience as a coach and director of Kumdo team in Korea," but does not elaborate or offer any specific details. Mr assertion that the beneficiary "is one of the most qualified Kumdo instructor[s] in the field" carries little weight, because the issue is whether the beneficiary is acclaimed, not whether he is "qualified."

Counsel asserts that the beneficiary's "certificate naming the beneficiary as a qualified Kendo instructor" is further evidence of a leading or critical role, but once again there is no explanation as to how such a role is leading or critical, or what the organization is for which the beneficiary supposedly serves a leading or critical role.

Counsel asserts that the petitioner "has been sitting on the panel of Referee Committee of Kendo since 1994. He served as a Judge in local, national level games, and most importantly, for selecting team members representing Korea for international events." A more detailed letter from indicates that the beneficiary "has served as a referee in every type of Kumdo game. Especially, he has served as a referee in games to choose the Korean national team members." According to Mr. the beneficiary's leadership roles have primarily been at the high school level in Korea.

We note that the beneficiary's claimed leadership roles have all been in Korea. Indeed, the general pattern of the evidence has focused on the beneficiary's reputation and achievements in Korea. The beneficiary, however, has been in the United States since April 2000, nearly three years before the filing of the petition. Assuming for the sake of argument that the beneficiary did attain national acclaim in Korea prior to 2000, such acclaim is not *sustained* if there is no sign that the beneficiary has continued to enjoy such acclaim in the years leading up to the filing date.

With regard to the beneficiary's recent activities, we further note that the beneficiary filed a Form I-485 adjustment application, concurrently with the petition. In documentation accompanying this application, the beneficiary indicated that he has been unemployed since December 1998, over a year before he left Korea in March 2000.

The director instructed the petitioner to submit additional evidence, stating that the initial submission did not establish sustained acclaim or extraordinary ability. In response, the petitioner submits redundant copies of previously-submitted documents, and counsel repeats several of the claims and arguments from the introductory brief. Counsel also asserts that the petitioner meets additional criteria, not claimed in the initial filing:

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

Counsel asserts that the beneficiary's membership in the Korea Kendo Association satisfies this criterion. Counsel does not specify what outstanding achievements are required for membership. Instead, counsel repeats the assertion that "[m]embership as a Dan in any Kendo Association is a great achievement." A letter from the

Korea Kumdo Association (which appears to be the same thing as the Korea Kendo Association) states "[t]he Korea Kumdo Association has about 500,000 members." This extremely large membership size does not readily suggest stringent membership requirements, limited to those who have demonstrated outstanding achievement.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

As noted above, the beneficiary has served as a referee at various levels of competition (although the record does not provide examples of specific instances where the beneficiary has so served).

In dismissing the petitioner's first appeal in 2002, the AAO discussed the petitioner's claims regarding the beneficiary's judging work. Because the present petition involves substantially the same claims and the same evidence, the AAO's earlier findings are relevant here:

> In describing the process by which Kendo players are promoted from one Dan to the next, Mr. [redacted] has stated that the examiners "are strictly selected for the examination." Service as an examiner in this way, particularly at the highest Dan levels, would appear to be more akin to the work of a judge than would the more routine duties of a referee. It also appears that it is more difficult to become an examiner than a referee, and therefore the examiners are fewer in number than the referees, although the record contains no exact figures in this regard. Certainly the examiners appear to judge the performance of individual Kendoists rather than simply officiating at competitions to ensure adherence to rules.

The director denied the petition, stating "[a]ny submitted evidence must show that the individual is one whose work is looked upon as being the pinnacle of achievement in the field." The director cited various shortcomings in the petitioner's evidence, and noted that the petitioner had previously sought the same classification for the same beneficiary.

On appeal, counsel argues that the director should have recognized the beneficiary's lesser nationally recognized prizes and awards. As noted above, we concur that the petitioner has satisfied the criterion pertaining to such prizes, albeit in a manner that leaves a significant gap between the beneficiary's final prize and the filing date.

Counsel argues that the director impermissibly required that the beneficiary must be at "the pinnacle of achievement in the field," rather than among "the small percentage at the very top of the field." Counsel then quotes a dictionary definition of "pinnacle" as "the highest point," but fails to explain how "the highest point" differs from the regulatory term "the very top."

Counsel repeats various prior claims (such as the assertion that the low number of 7th Dan kendoists implies national acclaim for athletes at that level), and states that the director failed to give due weight to those claims. Counsel does not establish that the petitioner has, in fact, met the criteria claimed. Rather, counsel merely repeats the *claim* that the petitioner has met them. Given that the Form I-140 petition, completed personally by counsel, contains a false statement regarding prior petitions, and given that the introductory brief accompanying that letter contains contradictory statements, such as conflicting numbers of 7th Dan kendoists, the director's reluctance to take at face value counsel's other assertions, which are often exaggerated or unsubstantiated, is hardly an abuse of discretion.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor. Review of the record, however, does not establish that the beneficiary has distinguished himself as a kendoist to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.